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No. 09-1235

IN THE

Supreme Court of the United States

SHOODLEY LEE CHERICHEL,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 12

TABLE OF AUTHORITIES

.....**Page**(s)

CASES

Abuelhawa v. United States,
129 S. Ct. 2102 (2009)..... 7

Alaska Dep't of Envtl. Conservation v. E.P.A.,
540 U.S. 461 (2004).....9

Albertson's, Inc. v. Kirkingburg,
527 U.S. 555 (1999).....10

BP America Prod. Co. v. Burton,
549 U.S. 84 (2006).....8

Cadet v. Bulger, 377 F.3d 1173 (11th Cir. 2004) 6

Carcieri v. Salazar, 129 S. Ct. 1058 (2009).....8

Clark v. Martinez, 543 U.S. 371 (2005).....4, 5

Elien v. Ashcroft, 364 F.3d 392 (1st Cir. 2004) 6

Francis v. Reno, 269 F.3d 162 (3d Cir. 2001).....6

Household Credit Servs., Inc. v. Pfennig,
541 U.S. 232 (2004).....10

In re J-E-, 23 I & N Dec. 291 (BIA 2002) 3

Kolovrat v. Oregon, 366 U.S. 187 (1961).....10

Massachusetts v. E.P.A., 549 U.S. 497 (2007).....9

National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) 10

Nken v. Holder, 129 S. Ct. 1749 (2009) 8

Olympic Airways v. Husain, 540 U.S. 644 (2004) 10

Pierre v. Attorney Gen. of the United States, 528 F.3d 180 (3d Cir. 2008) 6, 7

Pierre v. Gonzales, 502 F.3d 109 (2d Cir. 2007) 5, 6

Prosecutor v. Kunarac, Case No. IT-96-23 (Int'l Crim. Trib. for the Former Yugo. Crim. Trib. for the Former Yugo. (June 12, 2002) 4

S.E.C. v. Zandford, 535 U.S. 813 (2002) 9

Train v. Colorado Pub. Interest Research Group, 426 U.S. 1 (1976) 10

U.S. v. Donovan, 429 U.S. 413 (1977) 9

Villegas v. Mukasey, 523 F.3d 984 (9th Cir. 2008) 6

Williams v. Taylor, 529 U.S. 362 (2000) 7

STATUTES

8 U.S.C. § 1231(a)(6) 5

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) 8

Black's Law Dictionary (7th ed. 1999) 8

DOJ, *Best Practices for OLC Legal Advice and Written Opinions*, *available at* http://http://www.justice.gov/olc/preparation-opinions.html (last visited Sept. 7, 2010) 3

DOJ, Office of Legal Counsel, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) (Memorandum from Jay Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf 1, 4, 8

DOJ, Office of Legal Counsel, *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004) (Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen., *available at* http://www.justice.gov/olc/18usc23402340a2.htm ..... *passim*

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007). 9

Rachel Ward Saltzman, Note, *Executive Power and the Office of Legal Counsel*, 28 Yale L. & Pol'y Rev. 439 (2010) 3

Sup. Ct. R.:
Rule 10(c) 2, 9

Symposium, *Defining "Torture": The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of "Specifically Intended" When Applied to United States Interrogators*, 62 N.Y.U. Ann. Surv. Am. L. 465 (2007) 11

REPLY BRIEF FOR PETITIONER

The Eighth Circuit and the Board of Immigration Appeals (Board) concluded that Petitioner did not establish that it was more likely than not that he would be tortured upon removal to Haiti based on a narrow definition of specific intent under the Convention Against Torture (CAT) that the Office of Legal Counsel (OLC) expressly repudiated in its 2004 Opinion. App. 139a n.27.

Respondent does not dispute that the 2004 OLC Opinion repudiated the narrow definition of specific intent endorsed in the 2002 OLC Opinion. *See* Pet. 9; Opp. 1-15. Nor does Respondent dispute that both the Eighth Circuit and the Board applied that later-repudiated definition. *See* Pet. 16; Opp. 1-15. Yet Respondent never confronts how the 2004 OLC Opinion could repudiate this definition and not conflict with the Eighth Circuit and Board decisions that adopt the identical definition in construing the same language derived from the same treaty. *See* Opp. 8-15.

Instead of addressing this conflict squarely, Respondent offers numerous circumstantial explanations for why the two approaches do not conflict. Opp. 10-15. As explained below, none of the explanations has merit.

Moreover, Respondent never explicitly endorses the definition of specific intent adopted by the Eighth Circuit, the other circuit courts, and the Board. *See* Opp. 1-15. Respondent's failure to endorse this definition explicitly is further evidence that the weight of authority—this Court's precedents, OLC's 2004 Opinion, and the

foundational definition relied upon by the drafters of the requirement—supports a broader definition of specific intent that would reach cases in which a perpetrator knows that severe physical or mental pain or suffering is practically certain to follow from his conduct. *See* Pet. 2.

Respondent finally argues that, even if an "inconsistency" between the Board and OLC exists, Opp. 10, it is not the type of conflict this Court should resolve. *Id.* Contrary to Respondent's contention, this interpretive conflict presents a substantial and unsettled question regarding the uniform application of the criminal and immigration laws implementing the CAT, precisely the type of important federal issue the Supreme Court can and should resolve. *See* Sup. Ct. R. 10(c). Until and unless this Court intervenes, the United States can continue to remove individuals who are more likely than not to be tortured as that term is understood by OLC for purposes of enforcing the criminal laws.

1. Respondent first argues (Opp. 10-11) that the Board's interpretation and OLC's do not conflict because the 2004 OLC Opinion discussed "the boundaries of the criminal *mens rea*" in "general terms," while the Board reached a conclusion about "the elements of torture . . . in a particular factual setting." Opp. 11.[1] This argument lacks merit

[1] While Respondent correctly notes (Opp. 10) that the Board and OLC are two components of the Department of Justice, not two executive branch agencies, the important point, which the Attorney General does not dispute, is that "OLC's core (...continued)

because it incorrectly implies that the Board's decisions have been purely factual in nature. Instead, the Board first *construed the meaning of specific intent under the CAT* and then *applied* that interpretation to the specific factual scenario. *In re J-E-*, 23 I & N 291, 300 (B.I.A. 2002); *In re Cherichel*, App. 52a-53a, 54a. OLC analyzed the identical specific intent standard derived from the same legal source, as Respondent acknowledges. *See* Opp. 3-4. That OLC did not apply its interpretation to the factual circumstances presented here or in *In re J-E-* does nothing to lessen the underlying interpretive dispute.

Respondent next argues (Opp. 12-13) that no conflict exists because the 2004 OLC Opinion did not provide a precise definition of specific intent. Respondent's argument is unavailing because the 2004 OLC Opinion *explicitly rejected* the Board's definition. App. 139a n.27. That OLC did not specifically adopt Petitioner's interpretation does not render the adoption by the Board and the Eighth Circuit of a definition expressly repudiated by OLC any less contrary to OLC's opinion. *Id.*

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function," as defined on the Department of Justice's own website, "is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government." United States Department of Justice, *Best Practices for OLC Legal Advice and Written Opinions*, http://www.justice.gov/olc/preparation-opinions.html (last visited Sept. 7, 2010); *see also* Rachel Ward Saltzman, Note, *Executive Power and the Office of Legal Counsel*, 28 Yale L. & Pol'y Rev. 439, 447 (OLC opinions are "treated as binding rulings within the executive branch.").

Further, although the 2004 Opinion does not define specific intent precisely, it quotes approvingly from a "respected" criminal law treatise that endorses Petitioner's definition. App. 137a-138a; *see also* Pet. 8-9.

Moreover, contrary to Respondent's suggestion, OLC's rationale for declining to "pars[e] the specific intent element" (Opp. 11-12), only further illustrates the interpretive conflict. OLC was unwilling to define specific intent precisely to avoid "approv[ing] as lawful conduct [actions] that might otherwise amount to torture."[2] App. 139a. The clear implication is that OLC concluded that the rigid approach of the 2002 OLC opinion, adopted by both the Board and the Eighth Circuit, improperly narrowed the scope of culpability under the CAT.

Finally, Respondent's contention (Opp. 13-14) that the decisions of the Board and the OLC opinion do not violate the interpretive principle of *Clark v. Martinez*, 543 U.S. 371 (2005), is equally meritless. It is of no import that there is "no disagreement among the regulations, the Board,

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[2] Respondent posits the hypothetical case of a Haitian jailer who engages in brutal acts but claims he only acted to deter criminal conduct as a purported example of why OLC eschewed a precise definition of specific intent. Opp. 11-12. The example is flawed. The 2004 Opinion correctly distinguishes between purported *motives* for commiting the forbidden act, such as the explanations offered by the Haitian jailer and the accused rapist in *Prosecutor v. Kunarac* (cited in Opp. at 11-12), and whether an actor *specifically intended* the results of the forbidden act. App. 140a ("[A] defendant's motive . . . is not relevant to the question [of] whether he has acted with the requisite specific intent under the statute.").

and OLC that torture under the CAT requires specific intent." Opp. 14. *Clark* holds that the *meaning* of words in a statute cannot change with the statute's application because that would "establish . . . the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark*, 543 U.S. at 382, 386, Pet. 22.[3] The decisions of the Board and the OLC opinion are contrary to *Clark* because they adopt a *meaning* of the CAT's specific intent requirement in the immigration context that conflicts with OLC's interpretation for purposes of the criminal laws.[4]

2. Respondent notably never explicitly endorses the definition of specific intent adopted by the Board and the Eighth Circuit. *See* Opp. 8-15. Instead, Respondent defends the result the Eighth Circuit reached by (1) noting that other courts of appeals have sustained the Board's interpretation of immigration regulations, Opp. 9-10 & n.4, and (2) attempting to diminish the authority that supports a broader

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[3] In *Clark*, no party disputed that the statute in question, 8 U.S.C. § 1231(a)(6), contained the words "an alien . . . may be detained beyond the removal period." 543 U.S. at 378. As is the case here, the interpretive dispute concerned conflicting constructions of the statutory language and required a uniform interpretation. *Id.* at 379.

[4] Respondent's argument that the Board did not consciously disregard the 2004 OLC opinion (Opp. 13 n.5) is irrelevant. Whether or not the Board was aware that it adhered to a definition of specific intent in this case that the 2004 opinion expressly repudiated, the Attorney General should not "adopt different meanings of the same word in the same treaty." *Pierre v. Gonzales*, 502 F.3d 109, 120 (2d Cir. 2007).

definition of specific intent. Opp. 14-15. Both arguments are unavailing.

Despite acknowledging that the Eighth Circuit did not decide whether it should defer to the Board's decisions, Respondent argues that the other courts of appeals "correctly extended deference" to the Board's interpretation of immigration regulations "to the extent that the regulations . . . are ambiguous." Opp. 10 n.4. Respondent is incorrect that the Board's interpretation is entitled to deference. The Board does not have particular expertise in the construction or interpretation of the term "specific intent," and deference should not be accorded to the Board on issues that are not unique to immigration law. *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001). This is particularly true of a standard that, as the Eighth Circuit concluded, should be defined as it is "used in American criminal law." App. 25a. Thus, to the extent the Second, Third, and Ninth circuits deferred to the Board's interpretation, those decisions were incorrect. *See Pierre v. Gonzales*, 502 F.3d at 113; *Pierre v. Attorney Gen. of the United States*, 528 F.3d 180, 189 (3d Cir. 2008) (en banc); *Villegas v. Mukasey*, 523 F.3d 984, 988 (9th Cir. 2008).[5]

[5] The First and Eleventh Circuit cases cited by Respondent sustained the Board's interpretation of immigration regulations without interpreting the meaning of specific intent. *Elien v. Ashcroft*, 364 F.3d 392, 398-99 (1st Cir. 2004); *Cadet v. Bulger*, 377 F.3d 1173, 1195 (11th Cir. 2004).

Moreover, Judge Rendell's concurrence in *Pierre v. Attorney Gen. of the United States*—the only opinion to address the conflict between the Board and the Office of Legal Counsel—concluded that the Third Circuit should have held, as Petitioner contends, "that if *severe pain and suffering is desired or known to result* from the actor's conduct, the specific intent element is fulfilled." 528 F.3d at 195 (Rendell, J., concurring) (emphasis in original).

Respondent's attempt to reconcile the Eighth Circuit's definition of specific intent with (1) contrary Supreme Court precedents (Opp. 15) and (2) the foundational definition relied upon by the drafters of the relevant federal law (Opp. 14-15) is equally unavailing.

Contrary to Respondent's assertion (Opp. 15), this Court's opinions that define "specific intent" in a manner contrary to the Eighth Circuit's interpretation are relevant here, even though the opinions do not construe the CAT. *See* Opp. 15. This Court relies on its construction of legal terms with equivalent meanings in other legal contexts as an aid in statutory interpretation. *See, e.g., Abuelhawa v. United States*, 129 S. Ct. 2102, 2106 (2009) (relying on the Court's earlier interpretation of the terms "aid" and "assist" in the Mann Act as a tool in interpreting the definition of the equivalent term "facilitate" in the Controlled Substances Act).

This approach comports with the presumption that "legislatures act with case law in mind" and that "Congress ha[s] comparable scope in mind" when it uses a term in a statute identical or equivalent to one the Court has previously construed. *Id.* at 2106 (citing *Williams v. Taylor*,

529 U.S. 362, 380-81, and n.12 (2000)). This Court has applied this presumption in construing immigration provisions. *See Nken v. Holder*, 129 S. Ct. 1749, 1757-58 (2009) (interpreting the terms "enjoin" and "stay" based on their construction in separate contexts in other court decisions).

Thus, Respondent's argument that this Court's opinions endorsing a broader definition of specific intent—all of which predate Congress's ratification of the CAT—are not "relevant" (Opp. 15) is unavailing.

Finally, Respondent dismisses as "not so probative" (Opp. 15) the conflict between the broad definition of specific intent in the sixth edition of Black's Law Dictionary, which was available at the time Congress acted, and the narrow definition found in the seventh and later editions and relied upon by the now-discredited 2002 OLC Opinion, the Board, and the Eighth Circuit. *See* Pet. at 18-19. Respondent's argument ignores this Court's common practice of construing a term's meaning through reference to the Black's Law Dictionary edition contemporaneous to the statute's enactment as an aid in construing a term's meaning. *See Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009); *BP America Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).

3. Respondent also argues that, even if two components of the executive branch have interpreted the standard inconsistently, "it is not the role of this Court to resolve such inconsistencies." Opp. 10. Respondent is incorrect because the proper application of U.S. criminal and immigration laws implementing the CAT is "an

important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

This Court has frequently granted certiorari to address substantial federal issues even in the absence of disagreement among federal courts of appeals or state courts of last resort. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 505-6 (2007) ("Notwithstanding the . . . absence of any conflicting decisions . . ., the unusual importance of the underlying issue persuaded us to grant the writ."); *see also Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 482 (2004) (certiorari granted "to resolve an important question of federal law")

Specifically, certiorari has been granted to resolve important federal issues that are similar to the issue presented here.

First, certiorari has frequently been granted to review a lower court's interpretation of an important source of federal law such as the CAT. *See U.S. v. Donovan*, 429 U.S. 413, 422 (1977) (granting certiorari because the issue involved construction of a major federal statute); *see also S.E.C. v. Zandford*, 535 U.S. 813, 818 (2002) (granting certiorari to interpret the Securities Exchange Act); Eugene Gressman et al., *Supreme Court Practice* § 4.13 (9th ed. 2007) ("The importance of the issue . . . [related to] the construction and application of acts of Congress and federal administrative regulations. . . [can be] the major basis for securing review.").

Second, this Court has granted certiorari where, as here, dueling interpretations of federal law exist among or within executive agencies. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 487 & n.3 (1998) (certiorari granted due to "the importance of the issues" in determining whether an agency's revised interpretation of a statute was permissible); *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 5 (1976) (certiorari granted "because of the importance of the issue involved" in resolving an interpretive dispute over regulatory authority between two federal agencies).

Third, this Court has granted certiorari where, as here, the lower court's decision conflicts with the interpretation of the agency charged with interpretation and enforcement of federal law. *See Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 235 (2004) (granting certiorari to review lower court's rejection of interpretation by the agency charged with enforcing the Truth in Lending Act); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 561-62 (1999) (granting certiorari where Ninth Circuit's decision conflicted with the EEOC's construction of the Americans with Disabilities Act).

Fourth, and finally, certiorari has been granted in similar circumstances where the dispute raises an important issue arising under a federal treaty. *See Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (certiorari granted "because the cases involve important rights asserted in reliance upon federal treaty obligations"); *Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004) (granting certiorari to

review the lower court's interpretation of the term "accident" under the Warsaw Convention).

* * * * *

The conflict over the meaning of specific intent under the CAT has far-reaching implications that extend beyond the possible removal of Haitian nationals like Petitioner.[6] *See generally* Symposium, *Defining "Torture": The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of "Specifically Intended" When Applied to United States Interrogators*, 62 N.Y.U. Ann. Surv. Am. L. 465 (2007). The specific intent requirement informs the rights of United States citizens and the obligations of United States interrogators under the CAT. *Id.* This Court should grant certiorari to resolve this conflict and ensure a uniform approach to the definition of torture across federal law.

[6] Respondent's argument that the conflict between the Board and OLC does not result in the United States holding its interrogators to a higher standard than it holds the Haitian government (Opp. 14) ignores the practical concern that, under the immigration regulations, an individual can be placed into the hands of someone who could be prosecuted under United States law for torture.

CONCLUSION

The petition for a writ of certiorari should be granted.

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